

From the author

5 Mar 93.

ADDENDA

TO THE

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Law of Charitable Uses :

COMPRISING

The CASES reported and adjudged since the Publication of the HISTORY OF MORTMAIN, &c.
until Hilary Term 1793.

BY *A. HIGHMORE, JUN.*

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THE HISTORY OF MORTMAIN;
A TRACT ON THE LAW OF LIBEL, &c.

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ADDENDA

ADDENDA

TO THE

LAW OF CHARITABLE USES, &c.

OF DEVISING LANDS, &c.

IN reciting the first case which occurred after the Ante p. 64. statute of Mortmain had passed, *Asbburnham v. Bradshaw*, I have followed the report of it in *Burn's Ecclesiastical Law*, vol. 2, p. 477.—stating the ground of the decree in favour of the charity to have been, that though the testator died after the act, yet his will was dated previous to it:—but I have been lately informed that the ground was, that it appeared to the court that the testator was *insane* from the time of making the act until the time of his death, and that he had not a sufficiently lucid interval to make any alteration in his will.

Sir John James devised lands to be sold to pay debts, 1743. Atty. v. Lord Weymouth. &c. and the surplus to be invested as a fund for certain charities, which he forbore to mention, as the trustees knew his designs as to charities.—Adjudged void. Amb. 20.

A lease for years, held under the crown, of the right of laying mooring chains in the river Thames, 1759. Negus v. Coulter. was devised to a charity. Amb. 267.

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Sir

Sir Thomas Clarke, Master of the Rolls, said, This is clearly a franchise ; like a market, which may be in other persons than the owner of the soil : that makes it unnecessary to consider in whom the right of the soil is. It is an inheritance vested in the crown, and granted out for years ; the rent is reserved to the king, his heirs and successors, payable at the Exchequer. This puts an end to the only question which was made on the behalf of the charity, that it is no part of the land. The chains being moveable, makes this franchise no more personal than fairs or markets are. This is a grant of an interest in the inheritance. In *Hall v. Grey-Coat Hosp.* 1747, Fortescue, Master of the Rolls, was of opinion, that a mortgage in fee is within the statute of Mortmain. In *Atty. v. Merricke*, Sir John Strange considered a mortgage in fee to be an interest in the land.

1767.
Grosvenor v.
Hallam.
Amb. 643.

R. Goldsbury devised his real estates to be sold, and gave divers legacies out of the produce ; also two annuities to churchwardens for repairing his family vault, and the rest to charitable uses.

Lord Camden, Chancellor, declared, 1. The annuities void. They are given to churchwardens, who are not a corporation to take, and therefore are void at law ; and being so, a court of equity will not appoint new trustees to set them up.

2. They are not blended with the charities, but are distinct sums directed to be applied for that particular use ; and though the churchwardens could not take, yet the devise is good, and the heir at law is a trustee.

Next, It is material that the residuary legatees are not so of the land itself, but of the money after the
land



land is sold : and therefore declared the heir at law entitled.

John Williams, by his will, gave 1000*l.* to arise by sale of his real estate, for the purpose of bringing spring water from St. Arvan's, or elsewhere, to Chepstow, for the use of the inhabitants for ever. 1767.
Jones v. Williams.
Amb. 651.

Lord Chancellor Camden.—What is the definition of charity ? A gift to a general public use, which extends to the poor as well as to the rich ; many instances in the statute 43 Eliz. carrying this idea, as for building bridges, &c. the supplying water is necessary, as well as convenient, for the poor and the rich : and on these grounds declared the legacy within the statute of Mortmain, and void.

Hannah Allen gave the reversion of nine freehold houses, eight to eight poor people that had paid most and longest to the poor's books in *St. Mary Overy's* parish, as the books should prove, and the corner house (the 9th) to repair them ; and gave the dividends of 800*l.* 4 *per cent.* annuities, after decease of a tenant for life, to the eight houses for ever, to each house 4*l.* every year for ever, as the Bank pays the dividend. Gave to the poor of same parish the rent of her leasehold in Park-street.—She then gave coals and money to certain poor of same parish, and *what was left* to be given to the poor in smaller sums. Attorney Gen.
and Wardens of
St. Saviour's v.
Goulding and
another.
2 Br. Cha. 428.

Mr. J. Buller.—The questions are, Whether the gift of the 800*l.* can be supported ; for this purpose it is argued not to be within the statute (of Mortmain). With respect to the houses, the gift of them is void ;

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then, if the gift of 800l. cannot be applied according to her disposition, another question arises, whether the court is to apply it to some other matter *ejusdem generis*. The court has certainly thought it could vary the use; but the rule may be drawn from the cases, that wherever the court had directed the sum given to be applied to a different use, there has been proper ground for the court to say, the use to which it has been applied is consistent with the use declared in the will: but there have been subsequent cases which have varied the rule; where, according to the intention of the testatrix's applying the fund otherwise than to the persons inhabiting the houses, would be contrary to that intention, the inhabitants of the houses being the principal objects of bounty, if they cannot be supported, it is not to be given to the poor in general.

The second question is, Whether the testatrix has given the residue to the poor. It is impossible to put any other construction than that of the defendant's counsel (*viz.* the bequests being attached to the nine freehold houses, and therefore void, submitted that the residue was not void); the small sums given are out of a particular estate. In expounding the words of the will, it is necessary to take the whole of the will together. The testatrix begins every new sentence with the words *I give*; this helps on to the true sense of the will: "what is left" only signifies what is left of that subject.—The bill dismissed.

Michael Term, 1790.
Attorney Gen. v. Christ's Hospital.
Where an estate be given on condition, and the devisee take possession of it, he is bound to perform that condition, though a loss accrue thereby.

An estate being devised to Christ's Hospital, on condition

CHARITABLE USES.

§

dition of maintaining six children from the parish of St. Leonard, Shoreditch, and the Hospital having taken possession, the rents at first proved insufficient to maintain the number; and the Hospital had maintained only three; and an account having been exhibited to the governors, the latter had been satisfied. But upon filing the information it was found that there had been a mistake in the account, and the rents had not been expended, and it appeared the rents were not sufficient to maintain the whole number.

Lord Chancellor thought, whether the rents were or were not sufficient to maintain the number, the Hospital having taken possession of the estate, was bound to perform the condition, and that they should have considered of that previous to taking possession.

W. Phillips devised to reverend *Adam Aldridge* certain lands to hold to him for his life only, on the express condition, that he do, without delay after the testator's death, convey the same to trustees, to take place at his death, for the use and support of the preaching of the word of God at the meeting at *Lyndhurst* for ever; and in case such preaching should be discontinued, he directed the same to be applied towards a school for teaching poor children at *Lyndhurst* for ever; and gave Aldridge full and absolute power to settle the same accordingly.—“ And I further expect that he (the defendant) will, with the help of God, after my decease, without delay, settle and forward every thing in his power to promote and carry on the work of God at *Lyndhurst* aforesaid, both in his life time and after his decease. And if it should so happen that I have not left any of the aforesaid legacies in a lawful and legal man-

Doe ex dem.

Phillips

v.

Aldridge.

4 T. Rep. 264.

ner, to prevent any advantage being taken thereof, I do hereby give, devise and bequeath such legacy or legacies unto the said W. Downer and A. Aldridge, *in trust*, to be disposed of by them at their discretion for ever."

The court (Ashhurst and Buller only present) held, that though the subsequent limitation was void, the defendant's life estate was clearly good; that the religious persuasion of the defendant raised no ground of objection to his taking the estate; and that the devise over to the school only related to the limitation after the defendant's death.

The reporters, in a note, give an opinion, that the last clause appears fraudulent, as being an intended evasion of the statute, grounded on *Atty. v. Tyndal*, Amb. 614, (*ante* 70, 106) and that it is distinguishable from *Adlington v. Cann*, 3 Atk. 141, (*ante* 65) inasmuch as this is devised expressly in trust.

Hilary Term,
1791.
Leacroft
v.
Maynard.
3 Br. 233.

The testator gave several legacies by his will, which he directed to be raised out of his real estate; and, among others, a legacy of 1000*l.* to the hospital in the county of L——, and specifically bequeathed his personal estate. The legacy was of course void, by the statute of Mortmain. But the testator, by a codicil, revoked this legacy of 1000*l.* to the hospital in the county of L——, and, instead thereof, he gave the sum of 500*l.* to the hospital in the county of N——, without mentioning any particular fund out of which the same was to be paid. By the same codicil, he revoked several other legacies, and, instead thereof, gave smaller legacies to the same legatees, without mentioning any fund out of which the same were to be paid.

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CHARITABLE USES.

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On behalf of the hospital of the county of N——, Mr. *Attorney General* contended, that the legacy being given generally by the codicil, must be payable out of the personal estate: and that it might be reasonably supposed, that, after making his will, the testator was apprised of the invalidity of the charitable bequests charged on his real estate, and therefore revoked them, and bequeathed other legacies, generally, out of his personal estate.

But Lord Chancellor said, he thought that the codicil only meant to alter the quantum of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid: and that, therefore, the legacy to the hospital in the county of N—— was void.

SCOTLAND.

A legacy in South-Sea annuities was bequeathed for the maintenance of poor labourers in Edinburgh and towns adjacent.

1754.
Provost, &c. of
Edinburgh
v.
Aubery.
Amb. 236.

Lord Chancellor Hardwicke was of opinion he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, *viz.* to some of the courts in Scotland; and therefore directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the uses of the will.

ANNUITY.

A devise in trust, to pay 4*l.* *per ann.* out of a real estate to a charity.

Wright v. Row.
1 Br. 61.

This being void, the question was, Whether the specific devisee, or the heir at law, should take the an-

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nuity.

nuity.—The cases cited in favour of the heir were, *Wright and Horne*, 8 Mod. 222; *Durour and Motteux*, 1 Vezey, 320; *Grosvenor and Hallam*, before Lord Camden, 7 Mar. 1767; *Barrington and Hereford*, before Lord Apsley, in which latter case the annuity being charged on a personal legacy, the Master of the Rolls gave it to the residuary legatee. But here the Chancellor decreed in favour of the specific devisee, as arising out of his estate.

1767.
Christ-Church
College
v.
Barrow.
Amb. 641.

General Guise bequeathed his pictures, &c. to this college, directing that they should not be sold, *being a good collection*.—In his life-time he parted with some of them, and acquired above an hundred more. Decreed that they all passed.—See *All Souls v. Cadrington*; *1 Williams*, 597; and *Gayer v. Gayer*. (*)

2 Br. 662.

The school at *Bolton* was established by a private act of parliament, which provided, that if the trustees should find any of the trusts impracticable or inconvenient, they might apply by petition to the Lord Chancellor, to whom the act gave powers of variation.

An application, arising from inconvenience in the number of trustees, was made to reduce them; but the Lord Chancellor thought this not within his jurisdiction, which did not comprise a power to alter the general constitution of the trust itself, and that the application must be to parliament.

Thus the corporations in London, which have power to make bye-laws, cannot diminish the number of their courts of assistants.

(*) The late Sir Robert Rich, Bart. bequeathed by will several views of his seat at Waverly Abbey to the City of London Lying-in Hospital, whereof he was president.—A good legacy, pictures being personal estate.

AUGMENTATION.

AUGMENTATION.

DEVISE of the whole profits of an estate to charity; if the rents increase, they go to increase the charity.—Lord Hardwicke, C. 1753.
Atty. v. Johnson,
Amb. 190.

Sir David Williams, by will, 15th Jan. 1612, devised the whole profits of the tithes in *Gwenther*, in *Brecon*, to be disposed of for ever to the uses thereafter specified; and then gave to several charities and other public uses several certain sums to be paid annually; all which sums taken together made up the value of the tithes at that time. The tithes have since been greatly increased, and now produce annually more than sufficient to answer those particular sums in the will.

Query, Whether the surplus shall be applied in augmentation of those uses, or shall go to the heir at law? The case cited at the bar, of *Thetford School*, 8 Co. 130, is to the purpose: but a difference argued, that the estate in that case was given to feoffees. In this case the heir at law is the trustee; and testator might intend, if any surplus, his heir at law should have it. But in *Thetford School's* case the surplus must have gone to the feoffees. Indeed, at the time that case happened, courts of justice had not discovered that the feoffees would be trustees for the heir at law of the surplus, if there should be any. But this case is stronger than that: for the testator declares the whole profits should be applied; and being the case of tithes, it is much stronger still, because tithes are uncertain, and might by this time have been of much less annual

value, by changing the arable into pasture, &c.—It is a clear case.

Refer it to the Master to, &c. But I do not intend all the uses should be proportionably augmented: such as 10 s. for an annual sermon, &c. need no greater allowance, unless, as the clergy in Wales are in general ill provided for, the augmentation to be considered as adding to his provision.

This case was authority for a subsequent decision, in *Atty. v. Sparkes*, by Sir John Strange, who sat for Lord Chancellor Hardwicke: where the rents and profits had increased, the augmentation was decreed in favour of the charity, which must have borne any loss by a decrease.—*Vide* 2 Vern. 397; *Atty. v. Mayor, &c. of Coventry*; *Arnold v. Atty.* in 1753.

Finch's
Pre. Cha. 225.

Lands of the value of 8 l. *per ann.* were purchased by a parish trust for charitable uses, by building, &c. They improve to 450 l. *per ann.*; and by order of vestry, the trustees, in consideration of 1000 l. for the use of the parish, charge these lands as a security for an annuity of 100 l. The parishioners applied to the court to have this agreement set aside as a breach of their charity, but the court dismissed the bill.

1766.
Widmore
v.
Woodroffe.
Amb. 637.

Money, &c. to be laid out in land, &c.] Richard Widmore gave to corporation of Queen Anne's Bounty 200 l. to augment some poor vicarage in Bucks or Southampton; and gave one third part of the residue of his personal estate "to some public charity," declaring a preference of those for augmentation of poor vicarages, or the propagation of the gospel; another third part to be distributed among the most necessitous of his relations
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by the father and mother's side; and the other third part to *some public charity*; and appointed plaintiffs executors; and died, leaving defendant the only next of kin on both sides, being the only child of testator's sister. Two questions were made by the next of kin:

1. Whether the legacy to *Q. Anne's Bounty* is not within the statute of Mortmain, as the governors are bound by their own rules, confirmed by the King under the great seal, to lay it out in the purchase of land?
2. Whether this next of kin is not entitled to the third part of the residue given to the most necessitous of his relations by the father and mother's side?

See *Roach v. Hammond*, Pre. in Ch. 401; *Thomas v. Hole*, Ca. Talbot's time; *Carr v. Bedford*, 2 Cha. Rep. 146; *Griffith v. Jones*, 394; *Isaac v. Defriez*, 1754; *Brunsdon v. Woolridge*, 1765.

Lord Chancellor *Camden* declared the legacy to the corporation could not be supported. The charter of rules reserves a power to the crown to alter, vary and make new laws. These were in force at the testator's death, when the legacy was to take place. By the 13th rule, donations not given under particular directions are to go as the general fund. It was argued, that the word *purchase* was not to be confined to purchase of land only. But his lordship held he was to take it in the sense the crown did when the rule was made. The word *purchase* is put in opposition to *pension*. The 16th rule is decisive: it directs the money to be laid out in the public funds or securities, till laid out in purchase. Q. Whether any particular directions in
this

this case?—Argued, that considering the statute of Mortmain, the court may collect a particular direction from intention that it should be laid out so as not to fall within the statute. Though the Mortmain statute has made considerable alterations, yet I do not understand it was made to prevent charities. I cannot consider it as given under a special direction, without adding many words to the will, which cannot be done. If there can be a general bequest to the corporation, this is one, except as to the counties in which the augmentation is to be made. The testator seems to have known the rules of the society in case of a donation of 200 l. by adding another to it; and from thence I collect his intention that the legacy should be laid out in land. The cases cited are not applicable. *Soresby v. Hollins* was in the alternative. *Grimmett v. Grimmett* gave a latitude of option; and it was impossible, while the statute of Mortmain stands in force, that it could be laid out in land to the satisfaction of the trustees. There was no solemn determination in *Grayson v. Atkinson*, but loosely taken up by asking a question of Mr. Montague, the secretary of the society (one of the Masters in Chancery), who was upon the bench. It was a small legacy of 40 l. It appears by the register's book, that the question was reserved, and never came on again; so that case is out of the way.

Ante 74, 81.
Ante 79, 83.

Ante 80.

As to the next point, Whether the court should adjourn the cause till new regulations are made? I have no doubt but the crown may alter and make new laws; but they cannot have any retrospect. The legacy must vest at the death of the testator, or be void at that time; and the right vests in another.

To the second question, several cases have been cited, all proceeding upon the same ground, making the statute

tute of distributions the rule to prevent an inquiry, which would be infinite, and would extend to relations *ad infinitum*. The court cannot stop at any other line. Thus it would clearly stand on the word *relations* only; the word *poor* being added, makes no difference. There is no distinguishing between the degrees of poverty; and therefore the court has, as was unanswerably argued, construed the will as if the word *poor* was not in it.—2 Vern. 381, was taken up by Lord Keeper Wright as having found a single precedent, and he was glad to lay hold of it; but all the other cases cited on the other side are uniform and clear.

Where a residue is bequeathed to charitable uses, Mich. Term, and it turns out to be more than adequate to the number of the objects, the whole must be applied to similar purposes.

1791.
Attorney
v.
Earl of Win-
chelsea and
others.

3 Br. 373.

The Rev. Robert Chapman gave all his residue to his executors, in trust, to pay 12l. *per ann.* to a proper schoolmaster, for teaching all and singular the children of Ravenstone to read, write, and cast accompts, at some convenient place there; to lay out 20s. yearly in the purchase of such books as they should think proper for the use of the school, and apply the surplus, if any, in cloathing, and putting out apprentices to any trade, business or occupation that should be thought proper for them, two children of the parish of *Ravenstone*, and one child of *Little Woolston*; and to meet once a year, to inspect the management of the school, audit accounts, &c.

The testator died in 1785, without leaving any wife or children, or other next of kin than his only sister and nephew. The information prayed the establishment

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AUGMENTATION.

ment of the charity; and that, if the residue was more than sufficient, the charity might be extended.

The nephew, one of the next of kin, claimed a distributive share of such surplus, and stated that considerable part of the residue consisted of *mortgages*, or some other real securities. But the sister disclaimed any right or interest, being desirous that the charity should be established.

The executors admitted mortgages to the amount of 2200*l.* and a surplus beyond the precise number of objects specified by the will; and submitted that the charity ought to be extended.

It was referred to the Master, to take an account of the personal estate.

After the decree, the sister assigned all her interest in the mortgages and residue to the trustees, for the benefit of the charity. In consequence of this assignment, a supplemental information was filed, and the cause came on again.

Two questions were made,

1. Whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the statute of Mortmain?
2. Whether the surplus should not go to the next of kin; or whether the court should not consider the whole as disposed of by the testator, from the next of kin, and be at liberty to extend the charity by enlarging the number of objects?

In support of an arrangement to marshal assets, *Ante 95.* *Atty. v. Graves*, Ambler 155, was cited.—As to the meaning

meaning of real security, *Atty. v. Bowles*, 2 Vez. 547.—As to the surplus, that the whole residue was meant to be given, *Atty. v. Johnson*, Amb. 190: *Atty. v. Sparks*, ibid. 201.—*Atty. v. Hoare*, cited in *Atty. v. Green*, 2 Br. Cha. 495.—*Thetford School*, 8 Co. 130: 2 Vern. 397.

That the mortgages could not be included, *Atty. v. Ante* 95. *Martin*, where the residue was given to executors in trust, to be sold, and the produce to be disposed of for such charities as they should think proper. An account was decreed, and on second hearing at the Rolls, it was declared, that such part of the personal estate as arose from mortgages, or other real securities not specifically bequeathed, was applicable to the payment of *debts and legacies*, except those given to the charities, and that the residue should be applied to the charitable purposes of the will.—This decree, on an appeal to the Chancellor, was reversed, he refusing to marshal assets, and declared that the whole belonged to the next of kin, after costs. So in *Middleton v. Spicer*, 1772, no difference whether a particular or general bequest of the personal estate, part of which consisted of money due on mortgages and real security.—As to the surplus, the above cases were admitted; but whether the court would extend the charities where the information is for a *new establishment*, as upon the present occasion: See *Atty. v. Bishop of Oxford*, 1 Br. Cha. 444. The next of kin insisted on the surplus beyond what might be sufficient to build the church.—As to putting out apprentices, if the fund had amounted to any considerable sum, the court would not be at liberty to expend the whole in apprentice fees.—It must then go to the next of kin.

Master of the Rolls.—The question is, Whether the whole surplus of this personal estate is not intended to

go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified? The real intention of the testator is *perfectly clear*, that he meant to give the whole surplus. It has been said that the distinction is, that where there is a definite object, and that cannot take place, the court will not look for another object, but let the property go to the next of kin, or the heir at law; as in the *Attorney General v. Bishop of Oxford*, the only object the testator had in view was the building a church, or, in fact, creating a pillar of vanity; that was his sole idea, and nothing short of that could answer his intention: and therefore the object must be effectuated in toto, or the property fall to the next of kin. So in the *Attorney General v. Goulding* (2 Br. Cha. Rep. 428.), where Mr. *John Bailey* seems to have gone to a great extent, and as far as the case would well warrant him, it was held that the testator had no general intention beyond that specified in his will, and consequently that the bequest must be confined to the precise object, and not beyond it; but wherever the intention has been to dispose of the whole property to certain purposes, as in the early case of *Thetford School*, and numerous subsequent authorities, the whole has been applied: the intention has been considered as such, and it has been only inferred that the testator has been mistaken merely as to the *quantum*. It has been observed, as a strong mark of his intention, that by giving the apprentice fees to three objects, he has marked out the limits of his bounty, and that the confining it to that number will be a sufficient compliance with his intention: but, according to the disposition of this residue, his intention could not be limited to three boys; and if it would pay more, the
testator

testator has shewn an intent that the surplus beyond that must be applied in the same manner ; therefore I am of opinion, it must be applied to the charitable purposes mentioned in the will. Perhaps it may not turn out to be much more than sufficient ; but if it should, the next of kin may then come to the court, as in other cases, where there has been an increase of rents and profits.—And decreed accordingly.

Dr. Radcliffe, by will, 13th Sept. 1714, devised his manor of Linton, and other hereditaments in Yorkshire, to his executors and their heirs, in trust, to pay thereout yearly 600l. to two persons, to be chosen out of the university of Oxon, where they are masters of arts, and entered on the physick line, for their maintenance, &c. as travelling fellows ; and the yearly surplus, for ever, for buying perpetual advowsons for the members. He then charged several annuities on his Bucks estate, and gave his lands in Bucks, &c. and all his real and personal estate charged with said annuities, &c. to his executors, their heirs, &c. and willed that all the residue and surplus thereof should be applied by them to such charitable uses as they, in their discretion, should think best, but no part to their own use : and desired that, if it could be done in law, his Yorkshire estate should be conveyed and settled by his executors on the master and fellows of University College, for ever, in trust, for the performance of the uses therein before declared.

Attorney
v.
Green.

2 Br. 492.

An information had been filed, and decree made, in 1716, that the trustees should convey the Linton estate to the college ; which had been done. The estate for long time did not produce more than would pay the

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travelling

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travelling physicians; but at length producing a surplus, the college, in obedience to the will, purchased ADVOWSONS till they possessed as many as the statute of Mortmain, 9 Geo. II. would allow; *i. e.* a number equivalent to that of a moiety of the fellows. A surplus still continuing to arise, the college (under the idea that they could not purchase more advowsons) laid out part in increasing the value of the already purchased livings, and in adding to the income of the headship of the college.

The present information was filed against *Green* the heir at law, and the college, praying a proper application of the surplus profits not laid out in the purchase of advowsons under the will.

The heir at law claimed the surplus as undevised, and therefore a resulting trust for him. The college submitted, whether, the devise being before the Mortmain act, they might not purchase advowsons, though to a greater number than that of a moiety of their fellows: if not, insisted the surplus should be applied to other uses for the benefit of the college, as being the nearest possible application to the intent of the testator.

The question was, whether the operation of the statute of Mortmain, 9 Geo. II. can defeat this devise to the college, by raising a claim either on the part of the heir at law, or of the crown?

The court, on finding a charity inapplicable to the intended uses, has never from thence raised an use for the heir at law: he was, in all events, intended to be disinherited. The court has therefore applied the fund
to

to other charities as nearly as possible to those intended by the testator, as by increasing the number of objects where the property has exceeded the number proposed. —As in cases of alms-houses; Thetford school case, 8 Co. Rep. 130; Duke 78, &c.

Where the charity cannot take place in the same form, it shall as nearly as possible, and not go to the heirs. *Atty. v. Guise*, 2 Vern. 266; *Aylet v. Dodd*, 2 Atk. 238; *Atty. v. Baliol college*: *Atty. v. Johnson*, Nov. 1753, an increase of tythes devised to charity was decreed to extend the charity, and not go to the heir.

Atty. v. Hoare, 1779 and 1783. Real and personal estate were devised to pay annuities to six scholars, and to purchase advowsons for Jesus college.—In 1717, the court decreed that the heir should execute conveyances to trustees, for the uses of the will.

On a rehearing, a balance in the hands of receivers was ordered to be applied to the use of the college. It was now stated, that the college had purchased as many advowsons as the act allowed, and that the heir had never made the conveyance decreed: the information was filed against the then heirs at law, and prayed that the profits might be laid out for the benefit of the college. On the cause being heard in 1779, the accounts were directed; and on further directions in 1783, the heirs at law claimed the surplus of the rents, relying on what Lord Coke says, as to the heir of the founder taking, on failure of a monastery. Decreed that the heirs should convey to such persons as Dr. Hoare should appoint, having a day given them to shew cause, and that the college should lay a plan before the master: so that the decree was complete against the heir at law.

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—*Atty. v. Arnold: Shower's Parl. Cases*, 22; *Baylis v. Church*, 2 Atk. 239; *Wheeler v. Shear*, Mosely 288; and *White v. White*, 1 Bro. 12, were also cited on the same side.

Second point, as to the restriction by the statute from purchasing a greater number of livings, &c.—But that point was not finally determined in the case, and, upon the fairest construction of the statute, does not appear to be the meaning of the clause. The statute was only to operate upon gifts after 24th June 1736, and all gifts previous to that time have been held good. The clause as to the number of advowsons is restrictive of the exception of colleges, as being able to hold advowsons; it cannot therefore be held to be a prohibition of colleges having more advowsons than amount, in number, to a moiety of their fellows, but only to restrain their taking more by future gifts. If *other* had meant *more*, colleges having already more advowsons than the moiety of their fellows, must have lost so many of their advowsons as exceeded that number, which certainly was not the case. The statute therefore did not mean to diversify their right to hold advowsons obtained by any former act, or which they possessed at the time. This will, being made before the statute, is not affected by it. In this case it is purely by accident that the event has happened after the statute, by the increased rents of the property; but the case must be the same as if it had been a gross sum given previous to the statute, to be laid out in advowsons. Suppose it had been so, and the money had not been laid out, from proper purchases not offering, the money might be laid out notwithstanding the statute. The disposition might still have been legally made of the money:

money: money to be laid out, in this court is considered as done; as in the case of money to be laid out in land, it is considered as land.

The college, however, thinking themselves restrained from purchasing more advowsons, had laid out the money in the increase of livings already purchased, as being a purpose the most analogous possible to that which the testator intended; and by adding to the value of the headship.

Atty. v. Whorwood, 1 Vez. 534, was cited at a subsequent hearing, as deciding, that where the regulations imposed were inconsistent with the rules of the charity, it would be a resulting trust for the heir at law. —On the other hand it was contended, that whatever was not given to the charity went to the residuary legatee, there being an express intention in the testator to dispose of every thing: and cited 8 Mod. 222, and *Mfs. case*, *Goodright* and *Opie*.

Lord Chancellor said, the point in question was with respect to the charity itself. The court had had a plan laid before it: supposing the whole object of the charity to fail, and yet that the estate is by the will appropriated to charitable uses, still the will is a clear exclusion of the heir at law. It is under this idea, that many charities have been disposed of under the privy seal. Is then the heir disinherited?—He is to claim a trust not resulting from the will, but from the act of the legislature. If there be any case where the heir at law is disinherited, it must be that where the devise was good at first.—In the first decree, the devise was held up till the license to hold in mortmain should be obtained. So it was by Lord Camden, in the *Downing*

AUGMENTATION.

college case, which license has never yet been obtained, Considering the words of the last clause of the act, it is difficult to make it out that there is such a limitation as is contended for; but it has been so constantly understood the other way, that I do not think myself warranted to hold a different opinion. I do not see why some arrangement should not be made, by way of exchange of advowsons; but it is not necessary to declare that now. If that should fail, the question between the general trustees and the heir at law will then arise. I confess it will be difficult to obtain it for the heir at law, and perhaps as difficult for the general trustees. If all those should fail, it may be a question, whether it is become fiscal, or will go to the heir at law as resulting to the founder.

APPOINTMENT.

Finch,
Fre. Cha. 16.

Tenant in tail, without levying a fine, or suffering a recovery, may appoint to a charity, and it shall bind him in remainder.

Ibid. 270, 289.

A will wanting witnesses will not operate as an appointment to a charity, under 43 Eliz,

ERECTING

ERECTING AND BUILDING.

MUNDY, rector of Bickton, gave two pecuniary legacies to trustees, to be laid out in building a parsonage-house. 1759.
Glub. v.
Attorney Gen.
Amb. 373.

Sir T. Clarke, Master of the Rolls, held, This is not within the words or meaning of the statute. The statute was meant to prevent new acquisitions in mortmain. Erecting a building is not to be considered as such. Suppose the testator had not made such a devise, he might have been sued for dilapidations, and the money recovered would have been laid out upon the building. This is nothing more.—Decreed the money to be laid out.

So likewise a bequest of 200l. by Dr. Conings, to be laid out in repairing the free chapel at Grendon-Court, part of his own estate, was held by Lord Chancellor Camden to be not within the words or meaning of the statute: the words are, “to be laid out in the purchase, &c.” The meaning and intention was, to prevent increase of lands, &c. in mortmain, beyond what was so at the time the act was made. The legacy is only to support that which at the time of the will was in mortmain. 1767.
Harris
v.
Barnes.
Amb. 651.

Testator *Walter Scott*, in his will, used these words: *Attorney Gen.*
“I direct also, that my executors, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, out of some part of my money in the funds, the yearly sum of 200l. for and towards the support of a school at Ross in Herefordshire, at the v.
Jordan.
Mfs.
27 July 1791.

ERECTING AND BUILDING.

discretion of my said executors."—And he gave the residue of his personal estate to his executors.

Lord Chancellor (Thurlow) was clear that this bequest was good, as there was no direction for building or hiring a school. But no decree was made, as the executors proposed to found the school without compulsion.

Cases cited—*Da Costa v. De Paz*. Ambler 228.

Atty. v. Hyde. - Ibid. 751.

Vaughan v. Farrer. 2 Vezey, 182.

Atty. v. Nash. Before Ld. Thurlow, Ch.

Easter Term,

1792.
Atty. v. Nash.

3 Br. 583.

The residue of real and personal estate left to purchase ground for the purpose of erecting a school-house upon (on argument of a demurrer to the information), declared void.

Catharine Nash, having by her will devised the residue of her real and personal estate in trust for this purpose, gave several directions for the government of the school; and directed and empowered her trustees, out of her real and personal estate, to purchase such spot of ground, within the parish of St. Peter, as they should see proper for the purpose of erecting said house upon.

The relators, on being advised that so much of the will as directed the purchase of a piece of ground was void by the Mortmain act, but that if a spot could be procured, of the description in the will, by other means than purchase out of her estate, they might erect a school thereon; purchased with their own money a proper spot of ground, which they offered to give and appropriate to the charity.

The bill prayed an account, and that the charity might

might be carried into effect.—T. Nash, the testatrix's brother, demurred that the charitable legacies were void in law.

In support of the demurrer, *Vaughan v. Farrer*, 2 Vez. 182, et ante 100: *Gafril v. Baker*, ante 100 also—If the trustees had been directed to hire a house, it would have been the same as if the testatrix had given a leasehold estate, which would undoubtedly be bad.—*Atty. v. Bowles*, 3 Atk. 806: *Atty. v. Tyndal*, 1 Br. 444. n. Amb. 614, et ante 100: *Atty. v. Hutchinson*, 1 Br. 444. note, Amb. 751 (*): *Pelham v. Anderson*, 1 Br. 444.—Lord Camden thought it im-

(*) *Mary Glover* bequeathed 1500l. to be laid out in erecting a free school at *Royston*, and 2000l. invested at interest, for maintenance of schoolmaster and mistress, and for teaching twelve poor boys and twelve poor girls to read, write, &c. There was a piece of vacant ground at *Royston*, belonging to the parish, on part of which there was a school-house. It was unnecessary therefore to purchase; and this piece of ground was already in mortmain.

1775.
Atty. v. Hyde,
Hutchinson,
and others.
Amb. 751.

Lord Apsley, Chancellor, said, This case was new, in respect there is a piece of waste ground belonging to the parish whereon the school-house may be built. Lord Hardwicke's determination, in *Atty. v. Bowles*, was certainly over-ruled by Lord Northington in *Atty. v. Tyndal*, which latter determination has been followed by several others. Directions in a will to erect a school-house imports an intention to purchase; but where there is land already in mortmain, there is no room for such presumption. Devise of money to repair or build upon land that is already dedicated to the same use, is not within the statute; that was the ground of the determination in *Brodie v. D. Chandos*. Though it appears there is a vacant piece of ground in the parish, the will does not point at the piece of ground. The will does not say, "to repair or rebuild the school-house now standing on, &c." ; she meant to have a school-house of her own foundation; she had no right to say that the school which is now standing should be henceforward considered as the foundation.—Information dismissed.

possible

possible to separate the real from the personal. See *Soresby v. Hollins*, ante 74 : *Atty. v. Goulding*, 2 Br. 428. —In *Foy v. Foy*, Rolls, 1 Feb. 1785, A gift of 1000l. toward erection, &c. of an hospital for Gloster, Lord Kenyon directed an enquiry whether there was any hospital in the county to which it might be applied;— and in *Attorney General v. Bishop of Oxford*, 1 Br. 444, note, he declared he could not vary the use, by ordering a repair, where the testator ordered a building; for, he said, the intention must be implicitly followed, or nothing could be done.

In support of the charity it was urged, that wherever the direction is *only to erect and build*, without any necessity to purchase land, it may be so done as not to be within the statute. None of the cases before the court have been upon the subject of amelioration only of land already procured, but where land must necessarily be purchased; where that is not the case, the statute does not apply. Therefore, in *Harris v. Barnes*, Amb. 651, money left for repairing a chapel was held not within the statute: the note of that case gives the true sense of the statute, that it was to prevent the increase of lands, &c. in mortmain, beyond what was so at the time the act was made; whereas, where the object of the gift is only the amelioration of land already in mortmain, not an acre more gets into mortmain than was so before.—*Atty. v. Bowles*, and *Vaughan v. Farrer*, will support this charity; for if a house could be obtained, it would be unnecessary to build one.—*Atty. v. Lady Downing*, Amb. 555, it was said, that a direction to purchase land, as in *Atty. v. Tyndal*, was only if it should be necessary; the testatrix did not mean to preclude the trustees accepting a donation of land,

land, which would increase her fund.—*Grimmett v. Grimmett*, Amb. 210; *Atty. v. Hyde*, *ibid.* 751; *Atty. v. Goulding*; the very import was to bring people together; the principal intention could not take place without a breach of the statute, and therefore that which was consequential only could not take place. As to applying *cy-pres*, the cases stand as they did, untouched by the statute of Mortmain, as in *White v. White*, where the gift was to such lying-in hospital as the testator should appoint, and the testator made no appointment; the court applied the bequest. So in the case of superstitious uses, it was to be applied to a charitable use,

Mr. Solicitor General, in reply.

The question is, whether the intention in this case can be legally carried into execution? In order to discover this, it will be necessary to make some observations on the cases. The principle to be drawn from them is, that in every case upon a will where there is a direction to endow a school or an hospital, and no land already in mortmain is pointed out on which the building is to be, it is void, although the *erection* of the school or hospital be the principal thing in the intention of the testator: and the cases are uniform, where there is a direction to purchase, that the gift is void. In *Foy v. Foy*, Mich. 1785, the proposition is laid down, that where the gift is for *erecting and endowing* a school or hospital, there the court implies that a purchase is to be made. In that case the testator gave 1000l. towards the erection and endowment of an hospital in the county of Gloucester: it was not the sole fund, but in aid of a subscription for that purpose; and Lord Kenyon (then Master of the Rolls) referred it to the Master, to

enquire whether there was an hospital. The next clause in the will was, "I give 800l. for the purpose of erecting and endowing a school." On these two clauses the determinations were different: the former was referred to the Master, because the testator pointed to the hospital which was then erecting; but as to the latter, his Honour declared it void, and said he should have declared the other void also, if there had not been an hospital existing. The principle is this, that though Lord Hardwick, in *Vaughan v. Farrer* (ante 100), following the case of *Gafril v. Baker* (ante 100), said, if any one give land, the charity should be supported; yet he never meant to say, that a gift to erect and endow simply, was not void. The distinction is, that where the situation is pointed out, and is already in mortmain, the gift is good; where it is not so, it is bad. Then the question is, whether here the testatrix has pointed to any land already in mortmain. The intention of the statute was to prevent improvident disinheritances, as well as to prevent more land from coming into mortmain. If the direction was to hire land for the school, it would be equally void. But in the present case, there is an express direction *to buy land*, even without mentioning it: the court must imply it, for otherwise the executors might wait to all eternity for a person *to give land*. To say that a testator means the execution of the charity should be kept expectant till somebody will give land for the purpose, is impossible. If such a thing can be supposed, it must be a gift within some reasonable time: but here no such thing is pointed out. The case of the *Attorney General v. Hutchinson*, is said to be a stronger case than *Attorney General v. Bowles* (ante 105), because there was a piece of land; but where the testator does not point out the land,

land, he is not presumed to mean it. It did not occur to any body there to argue, that the having a school was the principal intention, and that it could be carried into execution without a school-house. Would the testatrix have given the charity, unless the purchase and building were to take place? An intention cannot be implied, that she meant it to be built on land to be given by another, or that the executors were at liberty to adopt any piece of land so given. Where a man gives a charity, he means it to be erected at his death, or soon after, not to wait an indefinite length of time for a gift of land. The *Attorney General v. the Bishop of Oxford*, lays it down, that you must execute the testator's whole intention implicitly: Lord *Kenyon*, in that case, would not execute the intention *cy-pres*. If the testator were to say, "I give 1000l. to be laid out in a building according to an estimate which amounted to 2000l." that would exclude the possibility of laying any part of the money out in land; but if he does not so point it out as to exclude the idea of purchase, it must be implied. But here the intention is pointed out; for in the last clause the empowers and directs the executors to purchase land, and it is the same thing whether the direction is in the first or last clause. What has happened in the *Downing* cause shews, that there is in this country a manner of making lands inalienable for ever; and so there would be as to money, if it was not to be laid out at some determinable time.

Lord Chancellor had, during the hearing, thrown out doubts, whether, supposing a certain sum given for the purchase, and another for the endowment, the former being void, would make the latter so likewise.

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At the close of the argument, he threw out some general ideas on the subject, to the following effect :

Whether the testatrix gave land, or money to be laid out in purchase of land, either would be positively within the rules of law, and consequently void ; but money given to improve charity lands, is not a laying out in lands, or devising lands. In the case of the legacy of 1000*l.* (*Foy v. Foy*), there was no application to land ; but in the case before Lord *Bathurst*, he thought it must be the intention of the testatrix that the land should flow from her, as well as the other parts of the charity. But it does not strike me that this is a necessary implication. On the terms of the will, I think she did not know the statute, and that she intended part of the fund, if necessary, to be laid out in land. But she meant principally the charity to be executed. She directed therefore the purchase, in order to give it scope : but surely it would not defeat her intention, if the land came *aliunde*. But Lord *Bathurst* thought it equally her intent to give the land from a vain-glorious motive. But if it is to be so construed by the spirit of law, we shall go but a little way if we do not save them by a distinction, that where the principal intent is to effectuate the charity, that intent will be satisfied by the land coming *aliunde*. I cannot conceive that it would disappoint her intention if the whole land came *aliunde*. The question is, whether authority given to the executors to lay out the money in land, will bring it within the statute ? If land were given, I think it clear the executors could not keep back one shilling of the bequest from the maintenance of the charity.

His Lordship, by order 24th May 1792, allowed the demurrer.

UNCERTAINTY.

G. CRANSTOWN bequeathed Bank annuities to the *poor inhabitants* of St. Leonard, Shoreditch. 1762.
Atty. v. Clarke.
Amb. 422.

Sir Thomas Clarke, Master of the Rolls, said, The court forms a judgment, upon taking all the circumstances into consideration, and inclines in favour of the disposition, *ut res magis valeat*. In *Atty. v. Rance*, July 1728, a legacy was given to *the poor*. There were no words in the will which discovered what poor he meant; but it appearing that the testator was a french refugee, the court directed the legacy to be given to poor refugees.—In *Atty. v. Browne*, in 1749, the words were very general.

The words in the present case are not so uncertain as in those cited. The word *inhabitant* bears a very general sense, and may extend to every body living in the parish. But, as it could not be intended that the poor inhabitants which are relieved by the parish should have benefit by this legacy, which in effect would be giving to the rich, and not to the poor, he declared, that the distribution of the legacies was to be confined to the poor inhabitants of the parish of St. Leonard, Shoreditch, not receiving alms; and ordered a scheme to be laid before the Master for such distribution.

Edward Koefs, by a codicil, gave the residue of his personal estate, in trust, for the augmentation of the charitable collections for Poor Dissenting Ministers of the Gospel in any counties of England, to be paid to the treasurers of such charitable societies, or fund, as the major part of the trustees should appoint. 1765.
Waller
v.
Childs.
Amb. 524.

The

The executors, by their answer, stated, that the Protestant Dissenters in this kingdom are distinguished by the several denominations of *Presbyterians*, *Independents*, and *Baptists* : and that the Dissenters of each of those denominations, living and residing in and near *London* and *Westminster*, have a separate society, consisting of persons chosen out of their respective congregations, which society is called by the name of " The Managers of the Fund for the Support of the Poor Dissenting Ministers of that denomination in the country : " and that there are charitable collections annually made at the said meeting-houses, belonging to most of the several congregations belonging to each of the denominations, in and about the cities of *London* and *Westminster* ; and the money given at such collections is constantly and regularly carried to the said fund, and paid into the hands of the treasurer thereof for the time being ; and that the same is disposed of by the said managers of such funds, for and towards the support of Poor Dissenting Ministers in the country, whose annual subscriptions from their own congregations are so small as not to be sufficient, in many cases, to support themselves and families with the common necessities of life ; and also, for the relief of any extraordinary necessitous cases of such poor ministers and their families as may occasionally occur : and they have each a treasurer, who takes minutes of their proceedings at their several meetings, which are fairly entered in books kept for that purpose, as also the accounts of the disposition of the said charity.

On hearing the case upon the Master's report, a question was made, Whether the charity bequests were not void, for *uncertainty* in the description ? But the
court

court was clearly of opinion, without hearing the counsel for the charity, that the bequests were good upon the words of the will, and upon the evidence which was read in support of the answer; and that they were intended for all the ministry in general: and ordered the money to be paid to all the treasurers of the three denominations, upon the trusts of the codicil.

A question was made by the court, Whether they could *marshal the assets* in favour of the residuary bequests, by directing the leaseholds to be applied in the first place in payment of debts and legacies, in order to leave the rest of the personal for the benefit of the charity. But it was given up on the part of the charity, upon the authority of the *Attorney General v. Tyndal*.—*Atty. v. Caldwell*, cont. post 47.

This case was on a devise generally of lands in trust to be sold or mortgaged, to pay debts, &c. and the overplus money and rents of the messuages remaining unfold, *to be applied to charitable and pious uses*.

1772.
Attorney Gen.
Wm. Herrick
and others.
Amb. 712.

Lord Chancellor Bathurst said, "I was inclined in favour of the heir; but the authorities are too many and too strong to contend with."—*Cooke v. Duckenfield*, 2 Atk. 562-5; *Atty. v. —*, 1743. From Lord Hardwicke's note-book: "There being no particular charity, his Majesty may dispose of the 400l. to such charity as he shall think fit."

Du Costa v. Depas, from same note-book: "I held the donation in this case to be a charity devise; and the use being against the policy of the law, the disposition was in the Crown: and I recommended it to Mr. Attorney General to apply to the Crown for a sign manual."

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Atty.

Atty. v. Peacock, 27 Car. 2, from Lord Nottingham's notes:—"Although the charity be uncertain to what poor it shall be applied, his Majesty may dispose of it."—His lordship afterwards, on a second hearing, 28 Car. 2, said, "No objection to the uncertainty of the object, for the King may appoint."

Lord Chancellor Bathurst concluded, That he would apply to his Majesty for his sign manual, as Lord Nottingham did in *Atty. v. Peacock*.

Souley v. Clockmakers Company. Devise in remainder to a body corporate in trust for the testator's nephews and nieces, and their child or children, &c.
12 Br. Cha. Rep. 81.

The court decreed these uses not defeated by the deficiency of the trustees, but that the heir at law took as trustee for the uses of the will; for, although the devise to the corporation is void at law, yet the trust is sufficiently *created* to fasten itself on any estate the law may raise.—This is the ground whereon the courts of equity have decreed in cases where no trustee is named.

Easter Term, 1792. Thus, if a trustee for charitable uses die in the life-time of the testator, the charity will be sustained by the court. As in the case which arose on the will of Mrs. Ann Cam, of Battersea.—She gave the residue to *James Vasson*, his executors and administrators, desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who have large families and good characters, and appointed him and the plaintiff executors.—*Vasson* died in her life-time, of which she had notice: whereupon the next of kin claimed the residue.

Moggridge v. Thackwell and others.

3 Br. 517.

It was insisted, that there being a general intention to give to charitable purposes, the gift itself was not void, but the appointment had devolved upon the Crown, or upon the Court: as in *Atty. v. Syderfen*, 1 Vern. 224, referring to a writing specifying charities, but not found; and *Frier v. Peacock*, "a gift for the good of poor people for ever: *Atty. v. Hickman*, 2 Eq. Caf. Abr. 193; in *White v. White*, "to such lying-in hospital as the executor should appoint," and afterwards struck out the executor's name: in *Doyley v. Atty.* 2 Viner 485, Plea 16: in *Widmore v. Woodroffe*, 1 Br. Rep. 13, n. Amb. 639, "to some public charity."—In all these cases the charities left were established.

It was contended, on the other side, that the cases in the books differ from the circumstances of this case.—Held the testatrix did not give the legacy to any particular charitable purpose, but left it to the executor personally to make the appointment. Then she must have it in contemplation that he must survive her, or die in her life-time; and although he dies in her life-time, and she have notice of it (*viz.* nine years before her death), she still leaves the power of appointment personally in him, who she knew could not execute it; therefore it does not appear that she died with the intention that it should be so distributed. The gift of the power lapses by his death, as much as an estate given to him would have done; because it has become impossible he should appoint, and she did not mean the confidence to go to his representatives.

In *Syderfen's* case there was no evidence that the testator had destroyed the writing: that would have been a revocation. In *Hickman's* case, the objects

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were defined, though the trustees were dead. In Doyley's case, the court held the new trustee to be within the directions of the will. In the present case, there is no designation of any charity; it is to Vaston, to such charities as he should think fit; so that the first question is, Whether there is any trust at all? For although a recommendation will raise a trust, it will only do so where the subject to be applied is certain, and the object to which it is to be applied is certain also.—And relied on *Harding v. Glyn*, 1 Atk. 469: *D. Marlborough v. Lord Godolphin*, 2 Vez. 61: *Atty. v. Glegg*, Amb. 584: and *Hibbard v. Lambe*, Amb. 309.—Held that only the surviving executor could appoint; so that, had he been dead, the whole must have failed.—In *Brown v. Yeall*, the residue was to be applied “to the purchasing of such books as, disposed of under the following direction, might have a tendency to promote the interests of virtue and religion, and the happiness of mankind;” and then directed this charitable design to be executed under the direction of such persons, and under such rules, as by any decree of the Court of Chancery should be directed.—Lord Chancellor held this gift to be void for uncertainty.

Lord Chancellor said, If the cases were not so clear, I think it would bear some reasoning: it is a gift of the “residue to *Vaston*, desiring him to dispose of it in such charity as he should think fit, recommending poor clergymen who have large families and good characters.” There has been some argument upon the effect of these words, and whether they are precatory or jussory; but it is perfectly clear that *Vaston* could not claim this property for his own use. All the rules, both of the civil or common law, would repel him from

from taking the property in that way. He could take it only for the purpose of charity. Then, he must be a trustee: it is the same as if she had given it to a certain charity, naming him as a trustee. Then the circumstance of his being dead in the life-time of the testatrix, or the length of time that he had been so dead, cannot govern the effect of the will: if it could, there might be a total end to dispositions by will.

This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy. Then, can I say that this legacy is not sufficiently distinct to bind the property? The most general gift to charitable purposes has been decreed to be carried into execution; and the trustee's not being alive to administer the charity, cannot defeat the intention. Here she has pointed out clergymen as the objects of bounty, which is sufficiently distinct; but it must be referred to the Master, to whom a scheme must be proposed for the execution of the charity.

Geo. Stanbridge, after giving to his wife Mary, for her ^{Michael Term,} life, the interest of such monies as he should die possessed of, or should be purchased with the residue of his estate after his decease, gave to the Treasurer of the London Lying-in Hospital for Married Women*, 300*l.* Bank stock; and also gave, by his will and codicil, other charitable and other legacies, chiefly in Bank stock: and not having any Bank stock at the time of his death, but dying possessed of a considerable surplus property in other funds, the respective legatees filed their bill against the executors for the establishment of their legacies out of his general estate.

* In the City Road.

The Lord Chancellor (*Thurlow*) by decree referred it to the Master, to enquire what Bank stock, and other public securities, the testator was possessed of at the time of making his will, and of his codicil, and of his death, and to take a general account of his debts and effects.

17 Jan. 1792. And this cause coming on again for further directions, it appeared that the testator, at the times above mentioned, was possessed of 3l. *per cent.* reduced annuities, 4l. *per cent.* annuities, and 3l. *per cent.* consolidated annuities, considerably more than sufficient to pay his debts and legacies; but that the testator was never possessed of Bank stock, on which account the Master had not computed interest on the legacy given to the Lying-in Hospital.

The questions were, 1. Whether the legacies given in Bank stock should be established, and paid out of the other funds? And,
2. Whether interest could be allowed thereon?

The Lord Chancellor ordered, That the executors should sell out so much of the 3l. *per cent.* reduced annuities, and 4l. *per cent.* annuities, as, with the amount in 3l. *per cent.* consolidated annuities then standing in their names, should be sufficient to answer the several stock legacies; and that such interest should be computed on the stock legacies, as would have arisen in case they had all consisted of 3l. *per cent.* consols.

1 Dec. 1792. This cause being set down again, upon the Master's further report it appeared, that Mary, the testator's widow, died on the 15th of March 1788—and that he had computed interest on 300l. 3 *per cent.* consols. from the preceding half-yearly payment of dividends previous

previous to her death, to Midsummer 1792, at 40l. 10s. —which was then ordered to be paid to the treasurer, and that capital to be transferred to the trustees for the charity.

So likewise, where, by the deficiency of accurately expressing the title of a charity, two claimants arose, the court notwithstanding maintained the charitable bequest.

Trinity Term,
1752.
Attorney-Gen. v. Smith.

Thomas Quelch, by his will, dated in 1762, gave to trustees all the remainder of his reduced and long annuities, in trust, to pay the dividends to his brother Richard; and, after his decease, he gave the same among his children, with remainders over, in default of children, to divers charities—among which he gave 500l. (part thereof) to “the Lying-in Hospital for Married Women,”—and appointed said Rich. Quelch sole executor.

Richard Quelch died in 1785; and by his will, conceiving that, “in case of failure of his brother’s will by mortmain or otherwise, the several stocks in that case became his property, he gave the same as therein directed.—The 500l. reduced annuities given to the Lying-in Hospital for Married Women becoming lapse, being two claimants, he gave the same to the Lying-in Hospital in Brownlow-street, near Long-acre, as believing that it was intended for that Hospital;”—and appointed defendant Smith sole executor.

An information was now filed, at the relation of the above hospital, against Smith and the London Lying-in Hospital in the City-road, praying that Smith might

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account for the legacy and dividends, and that he might either admit assets of both testators, or account for their respective personal estate.

Lord Chancellor (Thurlow) established the charity, and referred it to the Master to take an account of the personal estate of the testator, Thomas Quelch, and of his debts, legacies, &c. and to compute interest, &c. and to enquire what Lying-in Hospitals there were which were intended and came within the contemplation of the testator's (Thomas Quelch's) will.

WANTING

WANTING OBJECTS.

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WANTING OBJECTS.

THE Hon. *Robert Boyle*, by will dated in 1691, directed the residue of his *personal* estate to be disposed of by his executors for *such charitable and pious uses as they in their discretion should think fit*, but recommended to them to lay out the greater part thereof *for the advancement of the christian religion*. The executors had invested a considerable sum in the funds, with a view to purchase lands for the purpose, which had since been done under a former decree, which directed the lands to be conveyed to the city of London, in trust, to pay part of the rents to *Trinity college, Oxford*, whereof *Mr. Boyle* had been a member; other part for the propagation of the christian religion among the infidels in *Virginia*, as *Lord Burlington* and the Bishop of London should appoint.—The rents amounted to 300*l. per ann.* and upwards. Timber was afterwards cut down and sold, under the sanction of the court, which, with accumulations of interest, produced 1384*l.* 2*s.* 10*d.* in 3 *per cent.* consols.

Mich. Term,
1790.
Attorney Gen.
v.
City of London.

The dissensions between England and America began in 1775, and continued till 1783—when America was declared to be an independent state. In 1782 all remittances for the use of this charity in *Virginia* ceased—and an information was now filed, praying that the rents and arrears, and the stock purchased as above mentioned, might be applied in some other manner for the propagation of the christian religion in England.

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It was urged that this court could not now look to the application of any money paid to the colleges in America, to whom it had been remitted for the purposes of the will. Although they had a charter from William and Mary, they cannot now be considered as a corporation—a corporation is a creature of the great seal, and as such they have ceased to be a corporation. They claim as trustees; but cannot be considered as such, when the money paid to them would be out of the controul of the court.

On the other hand it was answered, That the revolution has not rendered them less amenable to the jurisdiction of the court than before, as they could then only be brought voluntarily before the court.—The college appeared under their seal.—Their claim, as such, is preserved by the treaty of peace, by which every right of every corporation is left as it was before, the treaty only recognising the independence of the government. Even in conquered countries, the situation of permanent bodies remains the same as it was, till altered by the conquering power. Thus, after the conquest of the English provinces in France, there were several convents in them that had lands in England; and though the convents became subject to the kings of France, their English lands, although during the time of the war they were seized into the king's hands, yet in time of peace the convents enjoyed the rents thereof, till the time of Henry V. when the lands were taken into the king's hands. If the trusts do not subsist, the lands would escheat to the Crown.

Lord Chancellor, during the argument, said, he could not see how the bishop's bill was to be sustained: he is only a trustee as to the mode of administration of the
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the charity, and has not therefore any interest to sustain a bill. With respect to the college, suppose they should misbehave, where is the *scire facias* to be brought? Suppose a conquest *in regem*, the law would be the same, but the *sci: fa:* could never be brought in the court of the conquered king.

After the argument, he said, that the trusts to the corporation to convert neighbouring infidels ceasing for want of objects (there being then no neighbouring infidels), the charity must be applied *de novo*. As to the other parties, he could not now consider them as corporations;—therefore he referred it to the Master, to propose a plan for the application of the produce of the estates according to the intentions of the testator—and ordered the costs of the college to be paid to their agents here.

MARSHAL-

MARSHALLING ASSETS.

MARSHALLING ASSETS.

ON the question as to marshalling assets, Lord Hardwicke, in *Atty. v. Graves*, 1752, (Amb. 158) said, "I shall not set up a new rule for the benefit of charities, but they may have benefit of the old rule.— When there are general legacies, and the testator has charged his real estate with payment of all his legacies, if the personal estate is not sufficient to pay the whole, the court has said the legacy to the charity shall be paid out of the personal estate, and the rest out of the real estate, that the will of the testator may be performed *in toto*. (Ante 95).

Amb. 704. This was refused in *Atty. v. Tyndal*, ante 70 & 106, and since reported by Amb. 614.—So likewise in *Foster v. Blagden*, in 1771, wherein *Sarah Knapp* devised her real and personal estate, after payment of her debts, funeral expences, and charges of proving her will, to the plaintiffs, in trust, to dispose thereof, and directed the trust money to be paid to certain charitable uses.

The bill was filed by the trustees for the directions of the court: and the question was, Whether the court would marshal assets, and order the debts to be paid out of the real estate, in order to leave the personal clear, that the devise to the charity might take effect?

Mr. Baron Smythe (who sat for the Lord Chancellor) declared his opinion, That the debts could not be thrown upon the real estate; and that the cases of *Mogg v. Bath-hospital*, and *Atty. v. Tyndall*, were in point.

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The same principle seems to have always guided the court, That though it will not marshal assets, and throw the debts upon the real estate generally, yet, where the court can support a charity, it always will.— This was nearly the same doctrine as that held in *Atty. v. Tomkins*, in 1754 (mentioned ante, p. 95), where the residue consisted, *inter alia*, of leasehold estate, which was ordered to be first applied to debts and legacies.—An experienced, but subsequent reporter has furnished the particulars of that case :—

Amb. 216; 1754.—Benjamin Tomkins being possessed of a term of years in land and other personal estate (but not seized of any realty), by will, 19th June 1751, after directing payment of his debts and legacies, devises the residue of his real and personal estate to trustees, to be managed in the best manner they could; the income to be applied towards clothing four poor men and four poor women, for ever, that should be inhabitants of the hospital left by his late grandfather, in *Abingdon*, Berks; and when there should be no such hospital, he directed the same to be disposed of amongst such poor people of the Baptist nomination as his executors should think proper.

After argument at bar—Lord Hardwicke,
Chancellor :

It has been determined on the statute against Papists, and likewise on statute of Mortmain, that the words “*any estate or interest*” in lands, extend to leaseholds.

Question. Whether, as the leasehold in the present case passes under the residuary clause, and not as a specific devise *eo nomine*, that will make any difference ?
—I shall not found my opinion on any such distinction.

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The observation I made in the *Atty. General v. Graves* (21st Nov. 1752) was in case of a liquidation of real and personal : and nobody could say out of which the debts and precedent legacies were paid. It might deserve consideration, but I gave no opinion ; and I give none upon it now.—My judgment is founded on the last point, that is,

Whether this leasehold shall not be applied first in payment of debts and legacies, and the charitable bequest take place out of the rest of the assets ?

The reason of marshalling assets of the personal as well as real, is always *ut res magis valeat quam pereat*.

As where there are general legacies charged on real estate, if the personal estate is not sufficient to pay the whole, the legacy to the charity shall be paid out of the personal estate, and the rest out of the real.

So where there is a particular disposition of the different species of estate, enumerating them, and in the devise of the residue one of them is left out, that part shall be applied first.

So, when there is a charge on the real estate, and part of it is left undisposed of, and descends, that part shall be first applied. *Galton v. Hancock*.

The same rule might prevail in this cause : for though this court will not set up a new rule of marshalling assets, in order to defeat and avoid the statute of Mortmain, yet the old rules may and ought to be applied, as before those statutes.

The bequest is good as to all the personal estate, except the leasehold : the leasehold cannot go to the executors ;

executors; because, 1st, the testator has used words to shew his intention of giving it away; 2dly, they are excluded from the undisposed residue, by having legacies:—Therefore it goes to the next of kin, and shall, according to the above rules, be first applied to payment of the debts and legacies, as a real estate descending would be before that part that is devised; and there being more debts and legacies than the leasehold estate would extend to pay, his Lordship ordered it to be sold, and the deficiency made up out of the other assets, and the rest to be applied to the charity.

2. This is not a specific bequest, as every devise of a realty is, but a general bequest of the *residuum*.

The case of the *Attorney General v. Graves*, 4th Nov. 1752, was cited.—Devise of the residue of personal estate to charitable uses, which (*inter alia*) consisted of a leasehold estate: and the court ordered that estate to be first sold, and applied to pay debts; and, if it was more than sufficient, the residue to the next of kin; and the charity bequest to be paid out of the other personal assets.

In this case the bequest was general, “That the remainder of all the testator’s effects, annuities, mortgages, bonds or notes, with furniture, &c. be sold, and what money they should sell for he gave to two charity-schools for boys and girls of St. Andrew, Holborn, in equal moieties.”—The mortgages were for years.

1766.
Attorney
v.
Caldwell.
Amb. 635.

Two questions.—1. Whether the bequest, so far as relates to the mortgages, is void by the statute of Mortmain?

2. Whether

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2. Whether the court will not marshal the assets, and apply the mortgages in the first place to pay the debts, in order to leave the larger fund for the charity?

The Master of the Rolls was clear, upon the first question, that the bequest as to the mortgages was void.—The mortgages, upon which the court has given judgment, were mortgages in fee, and this is only a mortgage for years. But that makes no difference; it is an interest in land. The case of *Atty. v. Graves* is an authority, that a term in gross is within the description of the statute. And cited *Hall v. Grey-coat Hospital*, 1747: *Atty. v. Meyrick*, 1750; ante 91, 101.

Upon the second question, his Honour distinguished between the case where a mortgage is given as a specific bequest, and where it passes by the residuary bequest, enumerated and described amongst the different species of estates, of which the residue consists. In the former case, it cannot be first applied to pay debts; but in the latter, it may: and cited *Atty. v. Graves*, ante 95, and *Atty. v. Tyndall*, 70, 106.

His Honour gave directions accordingly, that the mortgages should be first applied.

Mr. Ambler adds the following note under this report:—*N. B.* This is not properly marshalling assets, but arranging the different species of personal estate.

In *Hillyer and Taylor*, Amb. 713, wherein *William Browne*, the testator, by will, in 1757, had bequeathed his personal estate, and his estate at Foxfield, held by lease of the Bishop of Winchester, descendible to his right heir in trust to sell same, and to pay his debts
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and legacies, and also to Winchester College 100l. for superannuates not succeeding to New College; to the county hospital at Winchester 50l.; to the charity for relief of widows and children of clergymen 600l.; and, after reciting that it was uncertain what his effects might amount to, gave whatever remained after debts, legacies, and other charges, to his executors, for such charitable uses as they should think fit.

In 1761 the Master of the Rolls established the will, &c. and directed that, in case of deficiency of the personal estate, the legatees of the charity legacies should stand in the place of the specialty creditors, and receive a satisfaction *pro tanto* out of the real estate; but without prejudice to the question, Whether the legacy to the College was within the saving clause in the statute of Mortmain? which might arise in case the before mentioned marshalling of assets should not be sufficient to furnish the whole of the legacies given to charities; and if personal estate and rents insufficient, the real estate to be sold.—The personal estate proving insufficient, the estate was sold. The Master having reported, the cause was set down for further directions, which were given accordingly.

After twelve years the above decree was appealed from, occasioned by the above authority of *Foster v. Blagden*.

The Lord Chancellor, without hearing the reply, reversed the decree, so far as related to the charitable legacies to Winchester hospital, and for relief of widows and children of clergymen, on the above authority; and directed an enquiry what fund was established at Winchester college to defray expence of superan-

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nuates at either of the universities: and after ordering the costs, declared that the residue of the 3 *per cents.* (the produce of sale of the real estate) belonged to the heir at law.

1791.
15 Dec.
Linc. Inn Hall.
Lords Commis-
sioners Eyre,
Ashhurst and
Wilson—Eyre
absent.

Makeham
v.
Hooper and
others.

Joseph Lloyd, by his will, devised all his manors, lands, &c. as well freehold as leasehold and copyhold, situate, &c. and all his personal estate, to *Hooper and others*, in trust, to sell and dispose of the freehold, copyhold and leasehold lands, and to sell and convert his personal estate into money; and then, upon trust, out of the produce to pay divers charitable legacies, and 200*l.* to the treasurer of the *infirmary* at *Bath*, also divers pecuniary legacies to friends, and 200*l.* for erecting a monument in the parish church of *Ilton* to his memory; and gave the surplus and residue to *W. Makeham* and *D. Evans*, equally between them, whom he appointed executors.

By a codicil, the testator gave divers pecuniary legacies, and another charitable legacy, without mentioning any fund out of which they were to be raised.

D. Evans died in the testator's life-time.

Makeham, the surviving executor and residuary legatee, and *Thomas Lloyd*, the son of *Thomas Lloyd*, the testator's second cousin and heir at law (then deceased), and *Thomas Batt*, his first cousin, nephew of the half-blood, and only next of kin, survived him.

This bill was filed by *Makeham* against the trustees, &c. charging that the charity legacies were void by the statute of Mortmain, as devised out of the produce of land, and sunk into the residue, to which he claimed to be entitled.

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On the part of the charities it was alledged, that, as the personal estate was more than sufficient to pay all the testator's debts and legacies, or at least to pay the charity legacies, the assets ought to be *marshalled*, so as to effect the designs of the will.

On the part of the heir at law it was insisted, that, as these legacies were void, he became entitled to so much of the real estates as they amounted to; and was also entitled to a clear moiety of the residue, which had become lapsed by the decease of *D. Evans* in the testator's life-time. To which *Thomas Butt*, the next of kin, also set up his claim.

Although the testator never made any disposition of the lapsed moiety of the residue of his estate in either of his codicils, yet it appeared that he had often declared his intention, in conversation, that *Makeham*, the plaintiff, should have the whole residue.

The infirmary at Bath claimed that legacy under the statute of Incorporation, 12 Geo. II. enabling it to take lands, &c. in mortmain, not exceeding 1000*l.* per annum; and by a subsequent statute, 19 Geo. III. *Ante* 156. reciting that act, and that the building had been completed, and that a great number of poor, who lived at great distance from Bath, and who, from their indigent circumstances, were incapable of trying or using the waters, had been admitted as patients therein for that purpose, and many of them had been perfectly restored to health, &c.; and stating the income of the hospital in lands not to exceed 240*l.* per ann. towards the 1000*l.* limited, and about 320*l.* dividends of stock, exclusive of voluntary contributions; that it was capable of holding 113 patients, but that the income was

incapable of supporting so large a number; and that many charitable persons might be inclined to grant lands to the use of the hospital, that were unacquainted with the forms required by the statute of Mortmain, whereby their intentions might be frustrated. It was therefore enacted, that all gifts and devises of lands, &c. or of money or stocks to be laid out in lands for said hospital, should be good and valid in law notwithstanding the statute of Mortmain, not exceeding the above limitation of 1000l.—[These defendants stated by their answer, that the personal estate of the hospital had been increased by pecuniary bequests, but that it had not acquired any greater estate in lands, in consequence of this act.]

Hil. 1784.

The Lord Chancellor, by decree, referred it to the Master to take account, &c. reserving the consideration of the charity legacies until after the report.—The estates were ordered to be sold in the mean time, and a distinct account to be kept of the produce of the real and of the personal estate.

25 Dec. 1792.

This cause coming on again for further directions, on the Master's report, it appeared that the charitable legacies amounted to 1200l.; that 1037l. great part of the personal estate, had been applied in payment of debts; and that a balance of 950l. remained in the hands of the plaintiff, as surviving executor.

That the real estates produced a very considerable sum.

The Lords Commissioners, after investigating all the points of this case, ordered (so far as related to the charities) that the legacy to the Bath infirmary should
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be paid, as being exempted by the act 19 Geo. III. from the statute of Mortmain; but that they must decide upon the authorities of preceding decisions; that they could not marshal assets for charities; and that therefore the amount of the charitable legacies belonged to the other claimants.

NUISANCE.

1752.
Baines
v.
Baker.
Amb. 158.

BILL for an injunction to stay building an hospital for people infected with the small-pox, in Cold-Bath Fields (*), very near the houses of several tenants of the plaintiff.—And the infectiousness of the distemper, and the terror it occasioned in the neighbourhood, were insisted on: also that the lessee for years, under whom the defendants claim, held the estate of the plaintiff; and in the lease was an express covenant against the house being turned to a brewhouse, which would annoy the neighbourhood.—It was said an affidavit was filed, that several tenants of plaintiff had given him notice to quit; but Lord Chancellor would not suffer it to be read, but took it up on hearing the counsel for the motion.

2 Roll. Abr. 139, 140; 1 Lut. 69; Haw. P. C. 75, f. 11, were cited: where it was held to be a common nuisance to divide a house in a town for poor people, which might increase infection in a time of plague.

(*) It is remarkable that the virulence of this disorder, when taken in the natural way among the common people, in general proves fatal upon an average—to one in every four patients—but by the books kept at the Inoculation Hospital, the other branch of the institution, it appears that out of the last 2263 patients inoculated, up to the close of 1792, only *five* have failed: so that it is not possible to form any ratio whereby to judge of any ill success by inoculation—one of the greatest blessings diffused upon mankind!

Lord

Lord Chancellor Hardwicke declined making any order, declaring himself of opinion that it was a charity like to prove of great advantage to mankind; that such an hospital should not be far from a town, because those who are attacked with that disorder in a natural way, may not be in a condition to be carried far.

Two things are to be considered :

1. Whether it is a nuisance at common law ?
2. If it is, whether a public or private nuisance ?

As to the covenant in the lease, there is no foundation for the motion on that; for it is not a general covenant against all nuisances, but particularly against a brewhouse. It comes to the general question. Cases are as cited. There was lately an indictment at the summer assizes in Suffex 1750, against Frewen, for such an hospital: defendant was acquitted.—This cannot be called a private nuisance; if any, it is a public nuisance: the former is to one person only, as building against lights; nuisance *ad vicinatum* is a public nuisance.

Bills of this sort are founded on being nuisance at common law. If a public nuisance, it should be an information in the name of the Attorney General, and then it would be for his consideration, whether he would file such an information or not; and that was the case for stopping a way behind the Exchange in the city. Lord King recommended it to the Attorney General to prefer an information in the King's Bench, to try whether it was a nuisance or not.

If the cases cited were law, *Query*, How far they would extend to all the hospitals in this town ?

Motion denied.

VISITATION.

1783.
The King
v.
Bishop of Ely.
2 Term,
Rep. 290. K.B.

IN this case, which, from its length and great importance, must be referred to in the very useful and accurate reports periodically published by Messrs. Durnford and East, considerable light was thrown upon the law of Visitation, as it affects the property and lands of colleges and hospitals, and the jurisdiction of the courts concerning it.

In general, the court of King's Bench will not interfere in the case of a Visitor, or review any determination made by him in that capacity; but as in this case the Bishop's right was restrained to the selection of one of the two persons presented to him by the Fellows, who were by the statutes constituted the judges of their fitness, this was held to be a case not within the Bishop's general visitatorial power.

To exercise a visitatorial power is a judicial act, and the Visitor should therefore cite and hear the parties; and unless there be a general visitation appointed, there should be an appeal to him, and he should decide on that appeal.

If a person be appointed Visitor with specific powers, he is bound by the precise words constituting that power, and they will be construed strictly by the courts; but if he be appointed General Visitor also, his authority becomes general, and extends beyond that limitation—as in the case of *Philips* and *Berry*, by Lord Holt, as cited in 2 Term, Rep. 346.

That the Visitor could only visit once in five years, unless called upon oftener by the college; and if he come uncalled within that period, it would be no visitation. But if a member expelled appeal to him, and he appoint a particular commissary to examine the case, this would not preclude his visiting again within the five years; for, as Visitor, he has a constant standing authority, at all times, to hear and redress the grievances of the members.

That the Visitor's sentence is final, and the validity or ground of the sentence shall never be enquired into; and this will appear, if we consider the reason of a Visitor, how he comes to be supported by authority in that office.

And that we may the better understand this, added his Lordship, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity.

Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land: if they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's courts. Of these there are no particular private founders, and consequently no particular Visitor: there are no patrons of these; therefore, if no provisions be in the charter how the succession shall continue, the law supplieth the defect of that constitution, and saith it shall be by election, as Mayor, Aldermen, Common-Council, and the like; and so it was in the case of the town of *Launceston*, 1 Roll's Abr. 513.

Abr. 513.—But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no Visitor appointed by the founder, the law appoints the founder and his heirs to be Visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder. So it appears by the cases in *Yelv.* 65, and 2 *Cro.* 60, *Fairchild* and *Gaire*; where it is now admitted on all hands that the founder is Patron, and, as founder, is Visitor, if no particular Visitor be assigned. And so is 8 *E.* 3. *Aff. Placit.* 29, 31. So that patronage and visitation are necessary consequents one upon another; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical: it is an appointment of law: it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behaviour of the members that partake of the charity; for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them.—Now, indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of the charity, according to the case in 10 *Co.* there is no Visitor; because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and direction of the trustees. But where they who are to enjoy the benefit
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of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reasonable that he and his heirs should have that power, unless by the founder it is vested in some other. Now there is no manner of difference between a college and an hospital, except only in degree: an hospital is for those that are poor, and mean, and low, and sickly: a college is for another sort of indigent persons; but it hath another intent—to study in, and breed up persons in the world that have not otherwise to live; but still it is as much within the reasons of hospitals. And if in an hospital the master and poor are incorporated, it is a college, having a common seal to act by, although it hath not the name of a college (which always supposeth a corporation), because it is of an inferior degree; and in the one case, and in the other, there must be a Visitor, either the founder and his heirs, or one appointed by him; and both are eleemosynary. A Visitor being then of necessity created by the law (as 8 E. 3. 69, 70), every hospital is visitable, either by the patron if a lay hospital, or by the ordinary if spiritual.—What is this Visitor to do? He is to judge according to the statutes and rules of the college. He may expel, and (as in 8 Ass. 29, 31.) he may deprive. The only question there was, who was Visitor? For it is agreed on all hands, that, *quatenus visitor*, he may deprive. If he be Visitor as ordinary, there lieth an appeal from his deprivation: but if as patron, then none; that deprivation, whether it be right or wrong, was to stand good.

But you will say, the Visitor hath no court, and it is

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unreasonable to conclude a man by the sentence of one that hath no court. It is (I say) not material whether he hath a court or no: all the matter is, whether he hath a jurisdiction? If he hath a jurisdiction, and cognizance of the matter and person, and he giveth sentence in the matter, his sentence must make a vacancy, be it never so erroneous: but there is no appeal, if the founder hath not thought fit to direct one.—That an appeal lieth to the common law courts of England, is without precedent. It is plain, by all the authorities of our books, and by the way of pleading, that the cause of the Visitor's sentence is not examinable. If a sentence of deprivation be pleaded, you need not shew the cause: it is not traversable even in a Visitation, when it is by the visitatorial power:—So is *Rastal. Entr.* fol. 1, 11 H. 7. 27. and 7 Co. 42. *Kenn's case.*

On the same ground the court had decided before, in the case of the *King and Bishop of Lincoln*, that where by the statutes of a college a Visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties and form some judgment, though they will not oblige him to go into the merits; for it is sufficient if he decide that the appeal comes too late.—*Trin.* 25 G. 3.

The distinction relative to which court has a power to interfere, in cases of Visitation, where there are no Visitors, was clearly settled in the *King v. Gregory*, Easter Term, 12 G. 3. B. R. where Lord Mansfield stated, that it had been alledged that the power of the King escheats to the King in Chancery, as a charity—but that the foundation [of a college] is not a charity, and the

the power of superintending it does not go to the King as Visitor; but it is a corporation, and, as such, the right devolves to the King to be exercised here. The case of *Manchester College* is very strong to this point; for there, as long as the suspension of the visitatorial power lasted, it was the same as if there had been no Visitor, and the King, in this court, proceeded upon it. The statute 2 Geo. II. c. 29. is here very material; for as this court did not exercise the ordinary visitatorial power, that act made the King Visitor of Manchester college; but if any question concerning the election and interest arose, the act fixed the decision of it in this court. This being clear as to the right of this court [of King's Bench] to interfere, how is this mode to be applied? The change of the judge does not change the test by which it must be determined, which is by the statutes of the college.

As to this mode by information, the objection to it is strong, that no such information can be filed here under the stat. 9 Ann, and that all other informations ought to be filed by the Attorney General. But those informations did exist before the stat. of Ann. Every college is a corporation in itself; and altogether they form one corporation in the university in gross. There is a case in *Rushworth*, where it is said, that the Visitor of the university at large is the Archbishop of Canterbury. Yet if a person shew here a grievance which wants to be remedied, this court will find a remedy.—See 4 Term, Rep. 241.

In the case of the *King v. St. Catherine's Hall*, 4 T. Rep. 233.—1791, where a similar question was started on an application to the court of King's Bench for a mandamus to declare a fellowship vacant, and proceed
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to a new election, it was admitted that where the King was Visitor in right of a royal foundation, or by special designation, the power was to be exercised through the medium of his Chancellor, and not by the court of King's Bench; and that, where there was any Visitor, the court would not interfere in matters of visitatorial appeal: but it was contended that none of the authorities cited in support of those positions affected this case, *where, in default of heirs of the founder, there was no Visitor.*

On the contrary, it has been solemnly determined, that where there is no Visitor, or the visitatorial power is suspended, the remedy is by application to this court by mandamus. It is not pretended that the visitatorial power comes to the crown, in default of heirs of the founder, by escheat. The right of Visitation arises from the endowment of the foundation, in order to superintend the proper application of the founder's bounty. The term *escheat* is applicable only to tenure: so long, therefore, as the land remains to the original purposes, the visitatorial power which arises in respect thereof cannot be said to escheat.—In order to maintain a colour of argument for contending that this right vests personally in the King, in default of the founder's heirs, the other side are driven to have recourse to the term *devolution*; which is taken from the civil law, and is a source of acquiring rights or property unknown to our laws. The argument, if it has any foundation, must go the whole length of shewing that there must of necessity be a special Visitor of every institution of this nature; in which case it would necessarily follow that this court have done wrong in every such instance where they have interfered by *mandamus*.

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For the same answer might have been given to every application, on the defect of visitatorial jurisdiction : That where no other special Visitor was empowered to act, the visitatorial power devolves on the King personally, to be exercised through the medium of his great seal. Such a notion of visitatorial power is entirely new, and inconsistent with its origin, which arises from the private act of the founder himself, and subject to be moulded by him in whatever manner he pleases ;—which could not be, if it were a mere creature of law. Whereas the power of this court to interfere in such cases as the present, where there is no Visitor, or his power is suspended, has been long established, and arises from the general superintendant authority which it exercises over all corporations where other jurisdictions are deficient, to prevent a failure of justice. And no greater difficulties are likely to arise in these than in any other species of lay-corporations, which are alike governed by the general law of the land and their own peculiar charters or statutes. The only ground of application can be to enforce the observance of their institutions, which this court are just as well competent to do as any other tribunal.

With respect to the argument drawn from the exercise in fact of the visitatorial power by the King, that is easily explained. It is notorious, from the history of the reign of Edward VI. (*), and from the commissions themselves, which are in 15 *Rym. Foed.* 178 & 183, that they were not issued upon the foot of the King's general visitatorial power in the sense contended for, but were derived from his newly acquired spiritual

* See Burnet's Hist. Reform.

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jurisdiction upon the ruins of the papal authority in this kingdom. Neither was it a commission of Visitation to any particular college, but to the universities at large, both of Oxford and Cambridge. *Non constat* that the heirs of the founder were extinct at that time; at all events the Visitation did not proceed on that ground. Neither were the proceedings under those commissions of a visitatorial nature. The parties were not summoned or heard, nor was there any adjudication upon the supposed abuses which they corrected.— And the same answer applies to the statute 25 H. 8.

The power of visiting thereby conferred on the King was of an ecclesiastical nature, the same as had been claimed by the Pope before that time, as head of the church. And in those times these eleemosynary bodies were considered as ecclesiastical, though now that idea is exploded. On the other hand, the letters-missive of *Charles II.* were pure acts of arbitrary dispensation, and certainly could not be supported at this day, though the King still takes upon him in the university of Cambridge, to issue letters mandatory for the conferring degrees. Neither do those letters purport to be visitatorial acts, but are expressed to flow from his *royal* dispensation; a prerogative claimed and exercised, in those times, in other instances than these. But at all events, if the question depended upon this consideration, whether the King were in fact Visitor or not? the court would send it down to a jury to be tried.

Lord Kenyon (Chief Justice) delivered the opinion of the court:

That the right now claimed cannot be said to *escheat*: it is misapplying the word; for that appertains to estates held

held by tenure, and where, on failure of heirs of the donee, the estate reverts to the donor, as an escheat. But there are several kinds of property which belong to the King, when there is no other person to take them; as in the instance of all goods, of which no owner is to be found. Then there is nothing incongruous to the general principles of the law, to say, that this power, now contended for, which at the time when the charity was founded was vested in some body, should now devolve on the King, there being no other person who has any claim to it, to be exercised *cy-pres* to the manner in which it was exercised by the founder and his heirs. This power, though not expressly reserved to the King by the founder, yet belongs to him by operation of law. The great authority against this opinion, and which weighed most in our minds, was what was said by Lord Mansfield, in the *King v. Gregory*. But of that it is sufficient to say, that it was not the point in judgment before the court; his attention was not immediately called to it: and I do not believe it was an opinion by which he would wish to be bound: it being at the most an *obiter dictum*, we do not lay so much stress on it as we should otherwise have done, as it came from so high and respectable authority.

The other authority cited on the same side was the case of *Manchester College*, and the Act of Parliament which was passed in consequence of that determination. But I confess that that statute weighs in my mind the other way. It was contended by the counsel in support of the rule, that the last clause of that act was at variance with the first, and abridged the construction of it. The first clause in that statute enacts, That, when it shall happen that the wardenship of Man-

chester shall be held *in commendam* with the bishopric of *Chester*, the power of visiting Manchester College shall be vested in the Crown; and it enables the King to visit it, according to the charter of foundation: that power of visitation then must be exercised by the King in his Court of Chancery. If that clause had stood alone, it would not assist the argument in support of the rule; because we must suppose that the legislature intended, in that case, to follow the course of the common law as nearly as possible: and under that act the King cannot exercise his visitatorial power in this court.

Then it was argued, that the last clause controuls the operation of the former; because it provides, that disputes concerning the election of the members of the college shall be determinable by the course of the common law, as if there were no visitatorial power in being. But that clause does not say that, in future time, such shall be the law: it merely respects the case of the then existing members, leaving the power of visiting in other cases in the Chancellor, and cautiously avoiding to stir the question relative to the propriety of granting the mandamus which gave rise to the act.

These two authorities, which were urged in favour of the mandamus, being answered to our satisfaction, the only points left for our consideration are, the convenience of the case, and the general law on the subject.—In general, corporate bodies, which respect the public police of the country, and the administration of justice, are better regulated under the superintendence of this court than of the court of Chancery: but it is otherwise with the eleemosynary foundations in general.

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—What is said by Lord *Holt*, in 12 *Mod.* seems decisive of this question: for though it is only called his private opinion, yet, as it was formed by him on a subject which he had so thoroughly considered, and as the general convenience of the case coincides with it, it is entitled to our best consideration. Therefore, with no decided authority or general principle of law against us, but with the convenience of the case and general principles of law in our favour, we shall do more substantial justice to the parties in this particular case, and to the public in general, by refusing to grant this writ of mandamus, and by referring this question to the Lord Chancellor, than by entertaining jurisdiction over it.

Rule discharged.

ADDITIONAL CASES.

A Volume of Reports having been published by Mr. F. VESEY, jun. while this Addenda was in the Press, the following Cases, extracted from that Work, are here subjoined :—

1789, July 24.
Isaac v. Gompertz.

F. Ves. 44.

HELD, that stock (in the name of the Accountant General) could not be appropriated to the support of a permanent charity, because in its nature fluctuating ; but must be sold, and the produce applied for that purpose.

1790, Nov. 15.
Attorney
v.
Oglender.

F. Ves. 246.

There were two charities in a neighbourhood, and the description in the will was applicable to both. But, the relator not appearing to make out his title, the bill was dismissed : but the costs were not given out of the charity.

1791, May 7.
Attorney
v.
Haberdashers
Company.

F. Ves. 295.

The information was for establishing a charity under a will.—The company were the trustees.

Lord Chancellor.—The thing to be distributed is the surplus beyond the repairs and other charges. The Master ought to have reported the shares in aliquot parts, instead of monies numbered ; for the surplus must be an uncertain sum. The difference of the land tax, which may one year be four shillings in the pound, and another year three, may make a difference in the profits : so may the failure of tenants, &c. Therefore it ought to be distributed in aliquot parts to the proper objects, according to the directions of the testator. As to the execution of the trust, it is not to be

be kept under the direction of the court, to be executed by the court from time to time ; but is to be executed under the general direction of the trustees, which is the only way of administering a charity. Then the first thing they are to do, is to repair ; which must be *sub arbitrio bonorum virorum*. If the trustees misbehave, there must be another information, upon the new ground—I cannot keep this information here for ever. I know these applications (this was by petition) to the court are very expensive ; and for that reason I want to get rid of it.

A bequest of money to be laid out in land for establishment of a minister of a chapel, is void, and not supported by supposing a discretion in the trustees not to lay it out in land ; the directions being imperative.

1792, July 19.
Greives v. Case.
F. Vef. 548.

Testatrix having endowed the chapel of *Fakenham*, directed, by her will, that 600*l.* should be laid out in freehold lands, or copyhold with fine certain, and the rents to be applied to pay some small annuities. And “all the residue” she directed to be paid “in equal moieties, one to my friend *Thomas Mendham* for his natural life, the other to my friend *Samuel Eastaugh* for his natural life : and after the decease of *Mendham*, one equal third part of the interest or rents to be paid to the preacher or teacher for the time being, who shall statedly officiate in the chapel at *Briston*, belonging to *Mendham* ; the other two-third parts to *Eastaugh* for his life ; he and the said preacher exchanging upon Lord’s day alternately, the one at *Fakenham*, the other at *Briston* ; provided that *Mendham* and *Eastaugh* do not voluntarily withdraw from and refuse officiating, when able, at the said *Fakenham* chapel as usual : if

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they do during such recesses, the share of him or them refusing, to cease and go to the preachers appointed in his or their room. And after the decease of *Mendham* and *Eastaugh*, and the survivor of them, the interest or rents to be paid for ever to the preachers for the time being, who shall be chosen by the trustees of *Fakenham*, and the trustees and major part of the communicants of *Mendham* chapel at *Brisson*."—There was a proviso, that in case of *Eastaugh*'s apostacy, he should have no claim under this devise.

The coheiresses filed this bill; and Lord Thurlow had decreed that this devise was not void, so far as concerned the immediate annuitants.

On further directions, two questions were made:

1. Whether, in order to support the charity, it was not possible to consider the trustees as not bound to lay out the fund in land?
2. If not, whether the interest of the two annuitants (*Mendham* and *Eastaugh*) could be maintained, as being separated from the charitable trust, and intended as a personal bounty and favour to them?

Attorney General cited *Grimmett v. Grimmett*, Amb. 210, in favour of the charity, as considering the trustees not bound to lay out the fund in land.

It was contended for *Mendham* and *Eastaugh*—There are no such words in 43 Eliz. as *maintenance for a minister*, and it is not within the statute, though within the equity of it. 1 *Eq. Ca. Ab.* 95.—The only ground whereon this case can be taken to be a charitable use within the statute, is, that it is a provision for benefit of

of those to whom the religion is to be administered, not for the particular clergyman; for, giving a charity to provide a clergyman, cannot be deemed a charitable use with regard to the person, any more than a gift to any other person can be charitable for the benefit of the person to whom it is applied; as, to provide a surgeon for an hospital, &c. here it is a personal benefit, as in *Doe v. Aldridge*, 4 *Term Rep.* B. R. 264.—and *Barrington v.*——.

Solicitor General denied the authority of that case, and said that, when this cause was heard before the Lord Chancellor, the whole of the will was not stated.

Lord Commissioner EYRE.—The question made by the Attorney General must be first noticed, Whether this can be a good disposition to a charitable use, in respect of its being possible to lay out the fund otherwise than in land?—For that, a case from *Ambler* was cited.—The whole of that case rests upon a critical comparison of words. The words in that case were, “such purchase as is to the satisfaction of the trustees.”—If the question could be rested upon the similarity or synonymy of the two cases, it would be a fair argument. But I think, without saying whether I approve of that case or not, that this is substantially distinguishable, and upon the ground stated by Lord *Hardwicke* there; for he says, if it had been a disposition of money to be laid out in land, he should have been obliged to have said it was within the statute. Now this is that very case. Therefore, the case cited will not apply; and it stands upon so much nicety, that it is not proper to extend it to cases in which every part of the circumstances of that case does not occur. This devise therefore is void, within the statute of Mortmain.—The next considera-

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tion is, Whether these two persons are to be considered as having an interest detached from the trust, so as to be separated from the trust, though that should be condemned?—It is said to have been the opinion of the late Lord Chancellor, that they were to be considered as entitled to a life estate, notwithstanding the trust was not maintainable. That opinion is the only circumstance that raises a doubt in my mind as to the true construction of the will. The case from the *Term Reports* does not, upon consideration, bear upon this at all. But that opinion is a great authority, and deserves much consideration. Whether, according to the observation of the *Solicitor General*, every part of the will fell under the eye of Lord *Thurlow*, it is impossible for me to say. But the unfortunate circumstance is, that that opinion does not bind me, as the decree has not gone far enough to include that question; for though the language of it is, that that devise was not to be considered as void, so far as respects the immediate annuitants, I cannot comprehend these two persons under that description. The testatrix has determined whom she meant by those words; for she comprehends expressly the persons, to whom the small annuities are given, as her annuitants: and there is nothing in the decree to authorize me to suppose the Lord Chancellor meant to comprehend more under those words than she did. Besides, in propriety of language, these two persons were not annuitants. The others, who had small sums given out of the whole, were strictly so; but not these two, who take the whole residue, or the rents and profits of the fund, if the fund is laid out in land. Therefore under this decree it is void, as against them in that character. Then can they be so separated from the general trust that
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this court is bound to condemn, as that their interest can be maintained, though the interests of those who come after them cannot. It appears to me, that the object of the testatrix was to make a disposition to a charitable use; and though some arguments at the Bar tended to shew the establishment of a minister not to be a provision for a charitable use, yet that argument upon the whole falls to the ground, because it is admitted that, in respect of the benefit which the flock are to derive from the exhortations of the pastor, it is a charitable use. Here the general object was to make an establishment for the two chapels at *Briston* and *Fakenham*. The latter was her own, which she had founded, and which was apparently her first object. *Mendham*, it appears from the will, was the stated preacher at *Briston*, and *Eastaugh* was one of the stated preachers at *Fakenham*; but both, as appears by the will, were alternate preachers at *Fakenham*. Having a general object to provide for both chapels, and having apparently a great confidence in *Mendham*, and a reliance that that chapel would be taken care of without a special provision in his life; and having a view that in all events *Fakenham* should be provided for, as it had been, by the alternate preaching of both; she begins with giving them an estate for life in these premises, with a condition annexed, that they do not voluntarily withdraw, or refuse to do the duty they were accustomed to do at *Fakenham*. After the death of *Mendham*, when another preacher, whom she did not know, was to be appointed for *Briston*, she then comes to a more general idea of an establishment for both chapels. When *Mendham* drops, she arranges it in this way; that *Eastaugh* shall then take two-thirds, and the preacher at *Briston* one-third. But she expressly

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presly here makes that provision part of the trust and general object of the charitable disposition, because she has annexed to that, that they are to preach alternately at *Fakenham*. I lay no stress upon that proviso, that if *Eaflaugh* apostatizes, he is to have no part of her bounty, but to observe that it shews the consideration of her bounty to these two persons; and that consideration affords the true construction.

It was argued with great force, that there was a personal bounty intended to them. I agree, there was; but it was equally apparent that it flowed from a confidence in them, in the character of ministers of these chapels, and not in any other way. Then it comes to the question, Whether, if a plain trust and disposition to a charitable use is manifested by the will, and intended throughout, but if that disposition is also manifested with a certain degree of personal bounty and favour to particular objects, that will take the case out of the statute?—But I am of opinion that, if the personal bounty cannot be totally separated from the general object, in respect of which they are to have that preference, it is not sufficient; and it is proved clearly by the admission of Mr. *Mitford*, that if there is a general disposition to a charitable use, and the testator appoints the first preacher to exercise that function, that would be a case within the statute. That establishes the principle, that mere personal favour, and confidence, and benefit too, manifested essentially by the preference made of one to the other, as the first object of her bounty, will not separate that favour from the trust. It was manifestly her intention to make a general provision for the two chapels; to suspend that as to one, till the death of *Mendham*; and to continue it as
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to the other, from the moment of her death, and during his whole life: and consequently there is a charitable use subsisting from the moment of her death as to *Fakenham* chapel; and these persons have this bounty only in respect of that charitable disposition, consequently their estate cannot be separated from the trust; and if that fails, this, which is a part of it, must fail also.

Then, as to *Doe v. Aldridge*, the comments which have been made save me the trouble of saying much upon it. But we need not quarrel with that case; for though we may collect circumstances enough to see what the testator in all probability did mean, yet it is an answer, that where he says, he expects the devisee will promote the service of God, in those general words, the trust, which would be raised by the word "expect," would fail, because it is not sufficient to connect it with the other trust. If therefore there is a fair objection to connecting with the life estate the subsequent trust, that estate is not a disposition to a charitable use. Therefore that case does not apply to this: for there is no benefit here intended to these persons distinct from this;—that they had officiated at these chapels, and were intended to do so. Therefore the whole of this disposition, after the annuities, will fall under the general objection of a disposition of money to be laid out in land for a charitable use.

Lord Commissioner *Asburs*.

Upon the first question, I am clearly of opinion that the bequest is void in its nature. Those who have argued in favour of it, have relied upon that case in *Ambler*, in which Lord *Hardwicke* did not think the devise

devise absolutely void : but that was entirely founded upon the wording of it. It was not a gift of money absolutely to be laid out in land ; and though Lord *Hardwicke* did consider the case with a view to its being in the power of the trustees to lay it out so, if they thought proper, yet, as it was not obligatory upon them, he thought they would not in their discretion do an act which would be nugatory, but would suffer it to remain in the funds, by which means it would not be within the statute. As he went in that case on a criticism upon the words, we cannot do it in this case ; for the direction is imperative on them to lay it out in land.

The next question is, Whether there is any thing to distinguish the case of these two persons ?—I think there is not. It is true, the testatrix does appear to have had a particular predilection for them, from her long knowledge of them. But what was her general intent ? It was to appoint a perpetual chaplain in these two chapels : and this appointment of these two was only the inchoation of that charity. It is true, during their lives she makes a particular qualification as to the application of the fund respecting those two, which is not meant to extend to future preachers. They are to take in moieties this benefaction ; but her intention was as much to tie them down to the exercise of their function, in these chapels, as those to come after. That is plain from the will, which makes it as much a charitable bequest with regard to them, as to the others.—As to the case in the *Term Reports*, we may give it due merit, though perhaps it was not looked into as much as it might have been. The foundation of that idea was, that it was nothing more than

- than a bequest beneficial to the party, without annexing to it a stipulation of preaching in the chapel; which made it a charitable bequest as to the future preachers. Here it is expressly annexed to these two intents, which distinguishes this case from that.— Therefore I concur with Lord Commissioner *Eyre*.

GENERAL CONCLUSION.

THE preceding pages are now committed to public inspection, as the further result of attention, by study and practice, to the Law of Charitable Uses, subsequent to the publication of my "History of Mortmain."—The reader will here have found several cases of an earlier date, but which have been since published: these, with some recent adjudications, are now united with the former work, and will, it is presumed, form a general treatise on the Law of Charitable Uses, which has, since the passing of the Statute of Mortmain, been so amply discussed, and is now thoroughly established.

But the benevolence of the times, and the prevalence of commiseration for the distressed of others, have formed a system of charitable protection for the poor, which is paramount to all law, and unrestrainable by any interposition of argument.—"The liberal spirit of this nation at the present hour (says Dr. Vincent) is all directed to its proper end: it is in every instance *designed* to relieve unavoidable distress, or promote industry; and whatever promotes industry, augments the sum of happiness in the world. *Designed*, I say, and I hope executed; for in every charity where attention is paid to economy, each subscriber can do more good by his subscription, than by expending the same sum on the same objects himself (*)."

(*) Dr. Vincent's Discourse to the People of England.

GENERAL CONCLUSION.

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The same delightful energy which actuates the breast of virtuous charity, finds a ready asylum in the Courts of Equity, where it has been declared that the Statute of Mortmain was never designed to prevent charities, but to restrain a too copious endowment of them, to the detriment of the community—and where it has been always found that the utmost ambiguity, or uncertainty of expression in the will of the donor, shall be supplied and interpreted in favour of charity, if it can in any wise be discovered that charity was designed.—But though the Legislature has thought fit to leave all personal estate at the free disposition of its possessor, and though our Courts of Law and Equity are thus well disposed to encourage the promotion of every good work of this kind—still there may arise a few considerations, which, if duly weighed, may perhaps operate in some degree towards restraining an unlimited extension in the number of charitable institutions with which this metropolis is surrounded, and with which the country abounds. Their great number tends to injure the support of each other, which generally depends on voluntary and casual contributions.

There are many institutions of charity of so similar a nature in their object and extent, and embracing so nearly the same districts, that they might easily be united; and thereby the incomes, which barely serve to keep up their respective annual expence, would enable the directors to relieve a considerably greater number of poor.—By this union, the very serious charge of so many separate establishments of houses and offices would be saved.

But there are, however, many cases in which nothing less than a separate establishment could effect the
excellent

GENERAL CONCLUSION.

excellent designs of their patrons :—as, The Asylum, where orphan female innocence can hope to be preserved, by withdrawing, from the dangers of public seduction—The Magdalen Hospital, where repentance and reformation may hope to become effectual, which could never have been so much as fostered in the hurry of a licentious society—The Small-pox Hospital, where contagion itself finds at once a refuge and restraint—and in Hospitals and Houses for Insanity, where the severest affliction of human wretchedness can be best protected from its own mischief.

But the motives which have given birth to some of the modern and inferior institutions of charity, have not always been founded in principles of true charity, though it must be confessed that they may have relieved hundreds of the indigent poor.—Ill success at an election, and the unwarrantable practice of purchasing offices, by laying down subscriptions for a long list of names, so as to outvote an adversary, and swallow up the choice of the majority of the old patrons, have successively been productive of new institutions, set up for the support, or the introduction to life, of young professional men, whose ambition or interest was the first consideration for the establishment.

Where such a practice as that of purchasing offices is suffered to prevail, all discrimination of merit or skill is thrown aside ; and the poor, who are to be relieved by the successful purchaser, are devoted to the chance of his inexperience : the momentary influx of money to the charity is pregnant with a future evil, infinitely counterbalancing the present advantage ; for, at the expiration of the subscriptions so brought in, they are scarcely ever renewed, and the offence given to

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Again: I cannot omit recommending to the Governors of all charitable institutions a strict investigation into a practice which prevails, and is in many, though not in all of them, regularly allowed;—a practice which tends to the disgrace of this country—to the ruin of every principle or emotion of gratitude which might arise in the breast of a patient feeling the blessings of recovery while under their protection—which leads many of the indigent and distressed to undervalue the benevolent motives of their benefactors—and which opens a source of corruption inconsistent with the principle of every charitable foundation. — I mean, the practice of levying fees upon patients at their admission to, during their residence in, or at their discharge from, several of our principal hospitals. The wages of nurses and servants are thus, in part, drained from the

fcanty

GENERAL CONCLUSION.

scanty pittance of the poor, whose difficulty and delay in previously providing themselves with money and necessaries, often retard their admission till the ravages of their complaint leave them but a hopeless recovery. If admitted, through prevailing entreaties, and the extremity of their case, without these payments, they must despair of receiving all the attention necessary; and if it be granted them, the smallest act of duty is made to wear the semblance of favour and liberality. On the other hand, if they have money enough for the purpose, all gratitude is stifled by the right of an apparent purchase.

I beg leave earnestly to submit these few considerations to those who humanely "make charity their care,"—whose liberal zeal has irradiated their own and their country's praise—and whose example and influence over the minds and consequent actions of the poor, is of as much importance to their welfare, as any part of the information they can receive for the general regulation of their conduct.

I now trust the foregoing work to the candour and indulgence of the public:—I feel, and desire to acknowledge, the communications which I have received from some, and the confidence and encouragement of others, which have enabled me to send forth this addition to my former tract.—The continuance of favours so estimable will be at all times my most acceptable reward.

A. H.

Bury-Court, St. Mary Axe,
Hilary Term, 1793.

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